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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. EZEL ETHAN CHANNEL, Defendant and Appellant.	B216492 (Los Angeles County Super. Ct. No. GA064032)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lisa B. Lench, Judge. Reversed in part; affirmed in part.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan Sullivan Pithey and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Ezel Channel was convicted on count 2 of sending harmful matter to a minor (Brandon) and on count 1 of the lesser included charge of misdemeanor battery. Defendant admitted prior strike conviction allegations. At the time of sentencing, the court noted in case No. SA046498, defendant had been sentenced by a different court to a 6-year prison term after having been found in violation of probation. In this matter, the court imposed sentences which were to run consecutive to the sentence ordered in case No. SA046498; the court sentenced defendant to 16 months on count 2, plus a consecutive 6-month term on count 1.

Defendant timely appealed his conviction. Defendant contends there is insufficient proof that the material he offered to show Brandon was "harmful matter" as defined by Penal Code section[1] 313, subdivision (a). We agree and reverse in part and affirm in part.

FACTUAL BACKGROUND

I. Prosecution Case

A. Prior Incident

H. D. met appellant through his friend Joey. Joey was appellant's godson. On September 8, 2002, appellant saw H. walking around the neighborhood and asked H. to help him move some furniture at his house. At the time, H. was 13 years old. While sitting on the couch, appellant showed H. his penis and asked H. to show him his; H. complied. Appellant made a masturbating motion with his hand to show H. how to masturbate and asked H. to masturbate in front of him; H. complied. At some point, appellant touched H.'s penis under and over his clothes and asked H. to touch his penis.

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1 All statutory references are to the Penal Code.

Culver City Police Detective Kenneth Barrett investigated appellant. During a police interview, appellant said that after noticing H. masturbating in front of him, he advised H. to use the lotion in the bathroom. Appellant then performed a mock demonstration of masturbation in front of H. Appellant admitted that H. may have brushed against appellant's penis with the back of his hand and appellant may have also done the same to H.

B. Incident Involving Brian P.[2]

Sometime in 2005, Brian was with his friend Cesar at a park near Nickelodeon Studios, when they started a conversation with appellant, who at the time was wearing a jersey with "Nickelodeon" printed on it. The boys exchanged contact information with appellant and began visiting appellant at Nickelodeon Studios where he worked. At the time, Brian was 13 years old. Brian visited appellant alone at Nickelodeon Studios once on November 20, 2005. On that day, Brian and appellant were playing games on appellant's computer. Appellant began to talk about being like brothers and offered to show Brian some "porn" and took a DVD out of his laptop bag and played it for Brian. Appellant then went into another room while Brian watched the DVD. Brian described the DVD as showing lesbians "one was like in the shower and one was like dressed, and, like, later they started kissing and [making out] and then getting undressed." Brian explained that the two were engaging in oral sex, and then one woman penetrated the other's vagina with her finger and later with a lollipop. Brian began to masturbate. Appellant then returned and sat next to him. Appellant began masturbating. Appellant then reached over and touched Brian's penis under his clothes. Brian then jumped up,

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2 On the charges involving Brian, appellant was acquitted on count 3 (lewd conduct upon a minor), and the court declared a mistrial and dismissed count 4 (sending harmful matter to a minor) after the jury was unable to reach a verdict on that count.

grabbed a golf club that was near him and wielded it toward appellant. Brian asked appellant to take him home and he did.

C. Incident Involving Brandon A.

Brandon met appellant when his friend Cesar took him to Nickelodeon Studios. At the time, Brandon was 13 years old. Brandon visited appellant at Nickelodeon Studios multiple times. On one occasion, appellant allowed Brandon to drive his car in the Nickelodeon Studios parking lot. While Brandon was in the passenger seat looking out the car windows, appellant reached over and touched Brandon's genitalia over his clothes. Brandon immediately reacted and told appellant not to do it again or he would hit appellant.

Appellant offered to show Brandon a pornographic DVD on two occasions. Appellant described the pornography to Brandon as "Mexican pornography" with "Mexican women in it." On the first occasion, Brandon was in a conference room in Nickelodeon Studios. The second incident occurred over a phone conversation where appellant offered to show Brandon pornography. Appellant picked Brandon up in his car and drove him to Nickelodeon Studios. While at the Nickelodeon Studios parking lot, Brandon had a sudden feeling that what he was doing was wrong and wanted appellant to take him home. After trying to get Brian to watch the movie, appellant eventually drove Brandon home.

II. Defense Case

As of November 20, 2005, appellant had worked at Nickelodeon Studios for close to seven months. During the incident involving H., appellant lived near H., roughly a block away. As a result of the incident involving H., appellant had been convicted of lewd conduct on a child. Appellant was placed on probation and ordered to register as a

sex offender. Another condition of his probation required appellant to stay away from minors under the age of 18 unless other adults were present.

Appellant met Brian and Cesar at the basketball court near Nickelodeon Studios where Nickelodeon employees played on a team. Cesar and Brian visited appellant at Nickelodeon Studios. Around a week after meeting Brian and Cesar, appellant met Brandon who came with Brian and Cesar to Nickelodeon Studios. Numerous times the boys would come to the studios to see appellant without calling, and appellant would tell them to leave because he was busy. The boys would get free stuff from the facilities at the studios and engaged in "horse-play." Appellant also stated that he caught Brian masturbating at his computer at Nickelodeon Studios while appellant was at a copy machine. After that incident, appellant told Brian not to come to the studio any more.

Appellant testified that he caught Brandon "mooning" a couple through the window at Nickelodeon Studios; after that incident, appellant told Brandon not to come back to the studios. Appellant denied letting Brandon drive his car or offering to show Brian or Brandon pornography. Appellant also testified that the boys asked him to be an alibi to their parents for them when they would hang out at the mall.

III. Rebuttal

Detective Miller arranged for Brandon to make a recorded telephone call to appellant. During the call, Brandon mentioned that his parents were getting suspicious about something happening between appellant and Brandon. Brandon brought up the pornographic movie, and appellant asked, "[B]ut why did you bring up the movie? Did you think they found out about you doing that or something?" Brandon mentioned a previous occasion when appellant talked about "jacking off in front of each other." Appellant replied "that was a joke." Appellant asked Brandon if he could come over to the studio, and Brandon said he could not. Brandon then inquired as to whether appellant still had the "porno movie," and appellant answered "no, I destroyed that thing."

DISCUSSION

Appellant contends there is insufficient evidence that the DVD he offered to show to Brandon constituted "harmful matter" as defined under section 313, subdivision (a).

I. Standard of Review

The standard of review is if there is substantial evidence for a reasonable jury to conclude that the material appellant attempted to show to Brandon was "harmful matter" as defined by section 313. (See *People v. Dyke* (2009) 172 Cal.App.4th 1377, 1384.) The test is if the record as a whole contains solid and credible evidence of guilt from which a reasonable trier of fact could find the charges proven beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319.)

II. Relevant Statutes

Appellant was convicted on count 2 under section 288.2, subdivision (a), which states: "Every person who, with knowledge that a person is a minor, . . . knowingly . . . offers to distribute or exhibit by any means, . . . any harmful matter, as defined in Section 313, to a minor with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of a minor, and with the intent or for the purpose of seducing a minor, is guilty of a public offense and shall be punished by imprisonment in the state or in a county jail."

Section 313, subdivision (a) states "harmful matter" "means matter, taken as a whole, which to the *average person*, applying contemporary statewide standards, appeals to the prurient interest, and is matter which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which, taken as a whole, lacks serious literary, artistic, political, or scientific value for minors." (Italics added.)

Statutory construction determines the Legislature's intent in passing a certain statute. (*Burden v. Snowden* (1992) 2 Cal.4th 556, 562.) To determine intent, we first look to the language of the statute and ascertain its plain meaning. (*Ibid*.) If the language is "clear and unambiguous, there is no need for construction." (*People v. Woodhead*

(1987) 43 Cal.3d 1002, 1007-1008.) It is only when the language is susceptible "of more than one reasonable interpretation" that we look to a "variety of extrinsic aids." (*Ibid*.)

This definition of "harmful matter" was adopted by the Legislature in 1988. (Stats. 1988, ch. 1392, § 5, p. 4710.) The Legislature changed the beginning of the statute from "patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material *for minors*" to what it is today. (Italics added.) (Stats. 1986, ch. 51, § 4, p. 132; see also *People v. Dyke*, *supra* 172 Cal.App.4th at p. 1382 ["Thus, the statutory definition of 'harmful material' no longer specifies that the material must be such that average adults would consider it patently offensive and unsuitable for minors."].)[3]

The statute therefore clearly adopts the obscenity test used in *Miller v. California* (1973) 413 U.S. 15, 24, which reasoned that a trier of fact determines whether material is obscene by evaluating three elements "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." (Citation omitted.) The state test is the same, except that statewide community standards are evaluated not nationwide, and it must lack "serious literary, artistic, political, or scientific value *for minors*." (*People v. Dyke, supra*, 172 Cal.App.4th at p. 1383.)

The plain meaning of the statute's language is clear and unambiguous. It is the court's task "to construe, not to amend, the statute . . . and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been

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[3] In *Dyke*, the court noted that although legislative history indicated the change in the definition of harmful matter was primarily directed toward expanding the general definition of obscene matter to be consistent with *Miller*, it had contracted the definition as applied to the crime of exhibiting material for the purposes of seducing a minor and encouraged the Legislature to revisit the issue. (*People v. Dyke, supra*, 172 Cal.App.4th at p. 1383, fn. 4.)

inserted." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) This court may not "under the guise of construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*Ibid.*)

III. Sufficiency of the Evidence

The determination of whether material is obscene or not, is a question of fact. (*Miller v. California*, *supra*, 413 U.S. at p. 30.) The primary concern regarding this test is that "it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person -- or indeed a totally insensitive one." (*Id.*, at p. 33.) Here, we consider whether the DVD appellant offered to show to Brandon was patently offensive under contemporary statewide standards.

The only evidence of the allegedly obscene material is the testimony of Brandon that appellant offered to show him "Mexican pornography" with "Mexican women in it," and Brian's testimony describing a few clips of a DVD he saw involving lesbians.[4] Even assuming that the DVD appellant offered to show to Brandon was the same DVD appellant showed to Brian (Brian did not describe the DVD as showing Mexican women), there is still insufficient evidence in the record to hold the material described meets the test for "harmful matter."

The present case is similar to *Dyke*, where the only evidence offered that the material viewed by the victim met the "harmful matter" test was the testimony of the victim herself. (*People v. Dyke*, *supra*, 172 Cal.App.4th at p. 1384.) In *Dyke*, the minor victim stayed in the room with the defendant who was flipping through channels. (*Id.*, at p. 1380.) The channels defendant flipped through showed pornographic material, the victim testified that one program showed a naked woman dancing, which they watched for about a minute, and the second program showed a naked man and naked woman

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[4] Even though Brian and Brandon described the DVD as pornographic, there was no testimony as to what was meant by that term. (See *People v. Dyke*, *supra*, 172 Cal.App.4th at p. 1383, fn. 4.)

having sex, but the program only showed their upper bodies, which she watched for about 45 seconds. (*Id*., at pp. 1380-1381.) The court separated the material viewed into parts to determine whether the material was obscene. The court held that nudity portrayal was not obscene and the portrayal of sex also was not obscene. (*Id*., at p. 1385.) Furthermore, the work needed to be viewed as a whole to determine whether it lacked "serious literary, artistic, political or scientific value for minors." (*Id*., at pp. 1385-1386.) The court held that the record provided "no basis for drawing a reasonable inference that either clip lacked "serious literary, artistic, political, or scientific value for minors." (*Id*., at pp. 1386-1387.)

Similarly here the material can be broken down to nudity and sexual conduct. The first part of the clips Brian described involved nudity and kissing. The later parts involved sexual conduct. The Supreme Court held under the adult standard that nudity alone is not per se obscene. (*Jenkins v. Georgia* (1974) 418 U.S. 153, 161.) Although we are using an adult standard the court has also held that "all nudity cannot be deemed obscene even as to minors." (*Erznoznik v. City of Jacksonville* (1975) 422 U.S. 205, 213.) Equally the Supreme Court has held that the "'portrayal of sex . . . is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press.'" (*Kois v. Wisconsin* (1972) 408 U.S. 229, 231.) Moreover, the Supreme Court has also held that material even if characterized as "dismally unpleasant, uncouth, and tawdry" is not enough to make the material obscene. (*Manual Enterprises v. Day* (1962) 370 U.S. 478, 490.) The scene of sexual conduct is not automatically considered obscene, as the court has stated "sex and obscenity are not synonymous" (*Roth v. United States* (1957) 354 U.S. 476, 487.)

Accordingly, not all portrayals of sexual conduct and nudity are considered "harmful matter," which must be material that, taken as a whole, lacks "serious literary, artistic, political, or scientific value for minors." (§ 313, subd. (a).) The court in *Dyke* emphasized that certain films in order to explore certain subjects contain within them graphic depictions of sexual activity. (*People v. Dyke*, *supra*, 172 Cal.App.4th at pp.

1385-1386; *see also*, *Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 247-248.) It would be inconsistent with the First Amendment to hold that the artistic, political, scientific, literary merit of a work would mean nothing if it contained a single explicit scene. (*People v. Dyke*, *supra*, 172 Cal.App.4th at p. 1386, see also *Memoirs v. Massachusetts* (1966) 383 U.S. 413, 419 (plur. opn. of Brennan) [The social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness].)

Even if it is presumed the DVD appellant offered to show to Brandon is the same DVD Brian saw, the only evidence of what was contained in the DVD is the testimony of Brian, who only saw some scenes from a DVD. As in *Dyke*, what was missing was any context for the material. (*People v. Dyke, supra,* 172 Cal.App.4th at p. 1385.) It is not possible to determine from this evidence whether the DVD did "lack serious literary, artistic, political, or scientific value for minors." Without that determination, a reasonable jury would not be able to judge the descriptions of the scene in the DVD as "harmful matter" as defined in section 313, subdivision (a).

Thus, there is insufficient evidence that the material appellant attempted to exhibit to Brandon was "harmful matter" as defined by section 313, subdivision (a). Appellant's conviction on count 2 of violating section 288.2 must be reversed.

DISPOSITION

Defendant's conviction on count 2 for violating section 288.2, subdivision (a) is reversed, and the matter is remanded for resentencing. In all other respects, the judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J. **JACKSON, J.**